BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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DATE: January 29, 1997

CASE NO: 95-INA-265

In the Matter of:

RITZ CARLTON HOTEL
Employer

On Behalf of:

SUSAN O'CONNELL
Alien

Appearance: Eileen M. G. Scofield, Esq.
Atlanta, Georgia
for the Employer

Before: Holmes, Huddleston, Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Susan O'Connell("Alien") filed by Employer The Ritz-Carlton Hotel("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Boston, Massachusetts denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the

Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On February 2, 1994, the Employer filed an application for labor certification to enable the Alien to fill the position of "European Human Resources Specialist," whose duties were described as:

"Plan and carry out policies related to all phases of Human Resources activities in European luxury hotel operations. Manage and direct pre-opening, opening and ongoing phases of operation, including legal compliance and adherence to company policy. Work with corporate development executives to assess Human Resources aspects of business development opportunities in Europe. Oversee and direct manager of personnel, benefits, training and other such Human Resources departments as they operate in Europe. Direct activities of 500 employees;report to Vice president of Human Resources for company."

Four years of experience in senior human resources management at 4 or 5 star hotel in Europe;BA in hotel administration and 4 years experience required. Salary was $61,000.00 (AF-117-143)

On October 24, 1994, the CO issued a Notice of Findings in which she concluded, ***inter alia***, that the alien does not meet the minimum requirements as stated on the ETA 750 Form A in violation of 656.21(b)(6). "Specifically the alien does not appear to have; the four years of experience as a senior Human Resources Manager in a four or five star hotel in Europe, four years experience in the job offered, experience at managing all human Resources activities with opening and pre-opening phases of luxury hotel operations in Europe, two years training, a B.A. in Hotel Administration, or four years experience in the job offered." (AF-57,58).

In response, Employer forwarded a detailed rebuttal listing the applications, resumes and other information on those applicants responding to advertisements and reason for rejection. Additionally, the work and educational experience of alien was

set out in detail. Included was description of her education. (AF-59-143).[1]

In her Final Determination, the CO stated:"ETA 750, Form A #14, the educational requirements were a B.A. in Hotel Management Administration. The ETA, Form A, does not state B.A. in Hotel Management or equivalent. It is recognized that the employer's advertisements reflect B.A. in Hotel Administration or equivalent, yet in the employer's response to recruitment U.S. applicants were rejected for not having a B.A. in Hotel Administration (along with a multitude of other reasons). It appears the employer's minimum requirements stated on the 750, were the actual minimum requirements used to determine the qualifications of U.S. workers." (AF-19,20)

A request for Reconsideration was denied; Employer December 28, 1994 appealed to this Board. (AF-1-18)

DISCUSSION

Where a CO determines that the employer has committed a harmless error, labor certification may be granted provided that the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. Gianni Leatherware, 90-INA-573 (March 10, 1992).

The advertisement, job posting and all or nearly all correspondence by employer stated that the equivalency to a B.A. (in hotel management) was acceptable. Thus all testing of the U.S. job market had the "equivalency" option available. Thus no U.S. available workers were prejudiced by the mere failure to set out the "equivalency" option on the form 750A application.

Moreover, the CO has not challenged the Employer's finding that all seven applicants were not qualified in the other two requirements. Thus no U.S. workers were denied an opportunity for employment based on the issue in question, educational, or equivalency, requirement.

Employer has at great length explained the experience, background and education of alien, including the "equivalency". It should not have to go through the lengthy process based on one

[1]In its brief on appeal employer stated:"This is not a case where the U.S. company is not paying the proper wage, is failing to exercise good faith in its recruitment of U.S. workers., or is failing to assess the qualifications of U.S. workers. On the contrary, this is a case of a U.S. business trying to properly go through the necessary steps in order to further secure its footing as a worldwide operation. Unfortunately, the U.S. Department of Labor, possibly incorrectly viewing its position as protecting the U.S. work force, is, in fact, endangering the many U.S.employees who depend upon this U.S. employer to continue to grow and produce revenue from throughout the world."

harmless failure to include the word "equivalency" on the application, when, in fact, the entire recruiting process has complied with and been based on the "equivalency" option. The CO should not play "Gotcha" without having valid reasons for rejection of certification. Matters not raised by the CO in the NOF may not be raised for rejection. Duarte Gallery, Inc 88-INA-92(October 11, 1989). Since Employer's minor misstep has not been a basis for denial and no other issues have been raised for rejection of certification, we must reverse.

ORDER

The matter is remanded for purposes of Granting certification.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

Inc., 89-INA-155 (Mar. 15, 1990). It may also be justified when the business requires frequent and constant communication with foreign-speaking personnel. ***Capetronic USA Manufacturing, Inc.,*** 92-INA-18 (Apr. 12, 1993); ***Bestech Group of America, Inc.,*** 91-INA-381 (Dec. 28, 1992). ***See also Sysco Intermountain Food Services,*** 88-INA-138 (May 31, 1989) (***en banc***) (business necessity for knowledge of Cantonese and Mandarin dialects shown when contacts with restaurant owners and suppliers require communication in Chinese).

Written assertions that are reasonably specific and indicate their sources or bases are considered to be "documentation" within the meaning of the pertinent regulations. ***Gencorp,*** 87-INA-659 (Jan. 13, 1988)(***en banc***); ***Greg Kare,*** 89-INA-7 (Dec. 18, 1989); ***Joanne and David Fields,*** 91-INA-2 (Nov. 23, 1992). Moreover, as contended by Employer in his appeal brief, submitting the surnames of students that obviously reflects their Polish origination is sufficient documentation. ***Raul Garcia, M.D.***, 89-INA-211 (Feb. 4, 1991). We thus agree with Employer that documentation of the use of the Polish language by these students has been established.

However, the business necessity of having a Polish speaking dance instructor has not been established. Assuming the business of Employer is "..the smoother assimilation of immigrants into our American culture..." as expressed by Rev. Gowin, it has not been demonstrated that dance instruction in Polish fulfills this purpose. Were the job opportunity that of a priest, or arguably a teacher in American history, the business necessity of communicating with newly arrived immigrants in the only language they spoke fluently might be established. Similarly, if the job opportunity was that of a dancer in a Polish troupe that performed in the United States, the necessity of knowing Polish dances and, perhaps, the ability to speak Polish to others in the troupe and perhaps before audiences who spoke only Polish could establish the business necessity. Even assuming, momentarily, that the need for instruction in some form of artistic endevour were necessary to the mission or purpose of Employer, that it should specifically be Polish dancing has not been demonstrated. We find, therefore, that the job opportunity applied for is unduly restrictive and tailored to the Alien's qualifications. Although Employer has demonstrated speaking Polish would assist a

dance instructor in communicating with recently arrived immigrants to teach them dancing, and thus would be a preference, he has not demonstrated it is a necessity. For example, Employer has failed to explain why workers, who have been in the United States working for the Employer for the past two years are unable to speak or understand any English. These workers could assist a dance instructor in communicating with his(her) students. Indeed,Rev. Godwin in his rebuttal letter states:"The class participants who, although speak English, prefer to rteceive instruction about Polish folk dances in Polish language.."(emphasis added) These statements are unsupported by any documentary or other evidence and are simply not sufficiently credible standing on their own to carry the Employer's burden of proof.

In its request for review, the Employer cited ***Golden City Chinese Restaurant,*** 89-INA-106 (Jan. 4, 1990). In that case, which involved a restaurant manager for a Chinese restaurant, the CO denied certification on the basis that knowledge of Chinese was unduly restrictive as it was a preference, not a necessity. The Board reversed, finding that the language requirement was reasonably related to the job and essential to perform the job duties, based on the employer's contention that the restaurant manager needed to be fluent in Chinese in order to communicate with its two Chinese chefs regarding orders for food supplies, invoice corrections, customer complaints, and special menus for banquets. That case is distinguishable from the instant case because the issue was not whether the documentation was sufficient but whether the employer's explanation was sufficient.[2] The Board also rejected the CO's assertion that the Employer has the burden of proving its restaurant would not be able to continue operating if the restaurant manager could not speak, write, and read Chinese, thus requiring an inappropriate burden of proof; such an inappropriate assertion has not been made in the instant case.

Taken as a whole, we agree with the CO that the Employer's documentation in the instant case fails to satisfy the standard set forth in section 656.21(b)(2)(i)(C), which requires that the language requirement be "adequately documented as arising from business necessity." The conclusory statement that Polish workers who have been in the United States for two years cannot communicate at all in English so that their supervisor must be fluent in Polish is not sufficiently credible to satisfy the Employer's burden of proof without additional supporting documentation.

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[2] ***Hollytron,*** 88-INA-316 (September 28, 1989), also cited by the Employer, dealt with a company 80% of whose business was dependent upon the Korean community, and the employer there had adequately documented the need for communication with them in Korean.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Churchill Cabinet Company (Adam Fular, alien)

Case No. : 94-INA-520

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: